

SEEKING TRUTH IN COLOMBIA: PERSPECTIVES ON A TRUTH COMMISSION*

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BUSCANDO LA VERDAD EN COLOMBIA: PERSPECTIVAS
SOBRE UNA COMISIÓN DE LA VERDAD

BUSCANDO A VERDADE NA COLÔMBIA: PERSPECTIVAS
SOBRE UMA COMISSÃO DA VERDADE

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ABSTRACT

Truth Commissions (TCs) constitute a very important transitional justice mechanism but its effectiveness is difficult to measure. In this paper three categories are suggested to measure TCs' impact: the accomplishment of its mandate and objectives; the issuing of a final report; and, the achievement of certain political impact with its recommendations (Brahm, 2007; Ceballos Medina, 2009). The Colombian Truth Commission proposal issued by the Government and the FARC-EP on June 4th of 2015 is analyzed here under these categories to determine challenges and opportunities for its implementation. This is a reflective exercise that focuses only on the proposal but recognizes that the construction of truth and historical memory depend on many other aspects of the negotiations.

KEY WORDS: Colombia, FARC-EP, transitional justice, truth commission, victims.

RESUMEN

Las Comisiones de la Verdad (CV) constituyen un mecanismo de justicia transicional muy importante, pero su efectividad es difícil de medir. Este artículo sugiere tres categorías para medir el impacto de las CV: el cumplimiento de sus mandatos y objetivos; la expedición de un reporte final; y, el logro de cierto impacto político con sus recomendaciones (Brahm, 2007; Ceballos Medina, 2009). La propuesta de una Comisión Colombiana de la Verdad expedida por el Gobierno y las FARC-EP el 4 de Junio de 2015 es analizada aquí bajo estas categorías para determinar retos y oportunidades para su implementación. Este es un ejercicio pragmático que se enfoca únicamente en la propuesta pero que reconoce que la construcción de verdad y memoria histórica depende de muchos otros aspectos de las negociaciones.

PALABRAS CLAVE: Colombia, FARC-EP, justicia transicional, comisión de la verdad, víctimas.

RESUMO

As Comissões da Verdade (CV) constituem um mecanismo muito importante da justiça de transição, mas a sua eficácia é difícil de medir. O presente artigo sugere três categorias para medir o impacto das CV: o cumprimento de seus mandatos e objetivos; a emissão de um relatório final; e o atingimento de um certo impacto político através das suas recomendações (Brahm de 2007, Ceballos Medina, 2009). A proposta de conformação de uma Comissão Colombiana da Verdade, emitida pelo governo e as FARC-EP no dia 04 de junho de 2015 é analisada aqui através destas categorias, para determinar os desafios e oportunidades da sua implementação. Embora seja este um exercício pragmático, concentrado exclusivamente na proposta, reconhece-se que a construção da verdade e da memória histórica depende de muitos outros aspectos das negociações.

PALAVRAS-CHAVE: Colômbia, FARC-EP, justiça de transição, comissão da verdade, vítimas.

INTRODUCTION

Societies in transition from war to peace face the challenge of adopting transitional justice strategies that respond effectively to past abuses and determine the truth about what happened and why; acknowledge victims' suffering; guarantee perpetrator's accountability; compensate for past wrongdoings; seek no repetition; and, promote social healing (Hayner, 1994; USIP, 2008). Criminal prosecutions, truth commissions, reparation and compensation programs, and institutional reforms are the four processes believed to constitute the core of transitional justice, although the relationships between them do not follow any specific formula. The characteristics of these tasks depend partially on the particularities of the context, the nature of the abuses (systematic, ethnic, State-led), the political, judicial and economic structures characterizing the new Government and the victims' and society's expectations. Bearing that in mind, every mechanism has pros and cons for an effective transition. (USIP, 2008; Sandoval, 2011)¹.

This paper will focus on the role of Truth Commissions (hereinafter TCs), whose objective is "to ascertain the facts and causes of systemic abuse in the most objective way possible

¹ "In addition to these core processes, others have become part of the transitional justice agenda: primarily, national consultations, which have been strongly recommended by the Office of the High Commissioner for HHRR (OHCHR) and the Peace building Commission, which emphasize that "meaningful public participation" is essential for the success of any transition (A/HRC/12/18, 2009, and A/63/881-S/2009/304, 2009). National consultations should take place in relation to different aspects of transitional justice. Finally, Disarmament, Demobilization and Reintegration (DDR), which usually take place in parallel, rather than as part of the transitional justice processes, actively interact with it and complement transitional justice mechanisms and policies. DDR focuses on helping ex-combatants to stop fighting and to reintegrate into society (Waldorf, 2009). While all these processes are important, this report focuses on the core processes of transitional justice, namely: justice, reparation, truth and institutional reform" (Sandoval, 2011, p. 3f).

(...) exactly what kind of abuses occurred and why, and how to prevent their recurrence in the future, but in a non-criminal context” (USIP, 2008, p. 3). The aim of this paper is to explore the importance of TCs in the transitional justice and to outline the practical characteristics that make a TC successful. Afterwards, these findings will be applied to the TC proposal of the Colombian Government and the FARC-EP, called: Commission for the Clarification of Truth, Conviviality, and Non Repetition, which will be implemented once the peace agreement between the parties is signed. Challenges and possible opportunities for this upcoming TC in Colombia will be drafted.

I. Truth and truth telling mechanisms in the transitional justice

Do victims of Human Rights (hereinafter HHRR) atrocities want to remember or do they want to forget? For many, recognizing the truth of what happened in war represents a chance to know and clarify under what circumstances they or their loved ones became a target of violence (Becker, 2006). Truth is the right of victims to know what happened and how and the right of society to know the dynamics of a violent past (Uprinmy/Saffon, 2006; Antequera, 2014). For victims, truth telling and harm acknowledgment are crucial to heal; without them, it is impossible to move on (Villa-Vicencio, 2006; Brahm, 2007; ICTJ, 2013). In this sense, TCs play an important role in overcoming the violent past because they contribute to the reparation of victims and the eventual reconciliation of the society in question (Uprinmy/Saffon, 2006; Twose/Mahoney, 2015).

In recent decades, TCs have become one of the principal mechanisms for peace building, especially when political transitions are the product of a negotiation and not of the victory of one side of the conflict (Llewellyn, 2006; Brahm, 2007). They contribute mainly to restorative justice that “emphasizes transforming anger, resentment and vengeance to build community particularly by emphasizing reconciliation” (Brahm, 2007, p. 19). It is a type of justice focused on the restoration of past relationships and national history, in order to create a new society (Llewellyn, 2006; Sandoval,

2011; Castillejo, 2014; Bakiner, 2014). The instauration of TCs seeks to address needs and social expectations the courts cannot fulfill. One of the main differences between criminal justice and TCs is that the former deals with individual truth, whereas the latter clarifies collective truths. As a result, TCs cannot be expected to find the ultimate truth for all individual cases (ICTJ, 2008; Hayner, 2011).

Definition, characteristics and challenges of truth commissions

TCs are “Official investigative bodies [created by the State] comprised of independent experts that are responsible for investigating and reporting on patterns of HHRR abuses over a certain period of time in a particular country or in relation to a particular conflict. TCs allow victims, their relatives and perpetrators to give evidence of HHRR abuses, providing an official forum for their accounts” (USIP, 2008, p. 6).

The commissions have various characteristics. According to Hayner (2011), they are focused on past, rather than ongoing events; they investigate a pattern of events that took place over a period of time (not just individual abuses); they engage directly and broadly with the affected population, gathering information directly from their experiences (Interview witnesses, conduct site visits, and hold hearings); they are temporal (typically 6 months - 2 years); and, they are officially authorized by the State (created by official law or decree with wide powers of investigation). Moreover, TCs have “a specific mandate identifying the acts and time period to be investigated; are led by a diverse group of independent experts (typically 3 - 9 individuals); and produce and disseminate a final report, including conclusions and recommendations on how to prevent future abuses” (USIP, 2008, p. 6).

TCs should conduct profound investigations that include hearings, statement taking and research, all of them accompanied by victims’ and witnesses’ support mechanisms. Since commissions deal with sensitive issues, they should avoid re-victimizing (even by the way questions are asked) and guarantee victims’ physical and psychological security. In regard to hearings and statement taking, specially trained personnel are the ones who will have direct contact with victims. These people have a challenging role because they

should respectfully listen to victims and at the same time fulfill technical requirements for data collection (USIP, 2008). Public hearings, like the ones conducted in the Timorese TC, provide the opportunity to examine the indirect and direct responsibility of various sectors in facilitating and neglecting serious HHRR abuses (ibíd.). This tool is very useful because it reduces the possibility of denial and increases the transparency of the commission.

Research and investigation in TCs have the capacity to connect individual case investigations with thematic research (ICTJ, 2008). For this purpose, it is necessary to have considerable resources and experts in order to conduct robust investigations. Some commissions have also used information management systems in order to record information, establish patterns of abuse and provide further analysis and estimates about HHRR abuses. An example of this is the Peruvian TC that estimated killing and enforced disappearance figures through Multiple-Systems Estimation (MSE) (Landman/Carvahlo, 2010). It is important to notice that the more powers the commission has, the more abundant the resources and the investigative capacities it should have (USIP, 2008).

Given their insightful investigations, TCs are able to collect information far better than any other available historical record, resulting in a final report of the disputed events. Final reports are frequently the most visible legacy of the commissions and they influence how society in general understands the conflict and its national history. “Final reports include the facts and patterns of abuse as determined by the commission, analysis of responsibility, information on the victims and recommendations for steps to deal with the legacy of the abuses” (USIP, 2008, p. 10). Nevertheless, taking into account the circumstances in which TCs operate, the report might never be issued (case of Bolivia) or it may concentrate only in a small number of cases or in a specific crime (case of Argentina) (Hayner, 1994).

TCs may face some challenges during investigations that could hinder not only the issue of a final report but also the results themselves. First, commissions can be subject to intimidation and political pressure when truth might be inconvenient for people in power and therefore, evidence could be destroyed, the access to it might be denied, threats to victims may occur or the perpetrators and their political allies might try to pressure the TC to adopt

a biased approach in the investigation (Hayner, 1994; Brahm, 2007). Second, the design of a truth for amnesty formula might be challenging. “While the ‘truth for amnesty’ formula was used in South Africa, it was backed by a credible threat of prosecution of those who did not apply for amnesty or did not present the entire truth in their amnesty application” (USIP, 2008, p. 11). Third, the society and the victims might have unrealistic expectations about the TC’s scope and powers (Becker, 2006). And finally, resources for TCs might be limited (Sandoval, 2011). If, in spite of the aforementioned difficulties, the report is issued, it should become public domain and reveal the country’s own history, until then denied or unknown (Hayner, 2011).

Past TCs have published summaries of their final reports; special reports in newspapers; and, even some of them have made public the perpetrators’ list. In South Africa the TC handed a list of suspected perpetrators for 300 cases to the judicial authorities and called for rigorous attention to the prosecution authorities. However, little action resulted from it (Hayner, 2011). After the release of the TCs’ results, a public political apology or acknowledgment might follow. Those who have suffered want to know why they were made to suffer and who was responsible; they want an acknowledgment from the person(s) involved or some specific institution (Government, truth commission). “Where, however, acknowledgment comes from the actual perpetrator and includes an apology, the possibility of reconciliation is frequently further enhanced” (Villa-Vicencio, 2006, p. 71).

Another important consequence of TC’s results is that they might be directed to help to counter impunity either by passing their files to the prosecuting authorities or by recommending other sanctions to advance in criminal accountability, for example with vetting and other institutional reforms (Hayner, 2011). Nevertheless, history shows that TCs’ findings have rarely been used in criminal proceedings (Mendez, 1997 cited by Brahm, 2007) and the influence of TCs’ recommendations remains weak. “Government implementation is hard. Even when a TC mandate requires that a Government adopt its recommendations, there are often few resources available for the task, and political will may erode as time passes” (USIP, 2008, p. 12). In order to monitor the implementation of TCs’ recommendations and to continue investigations and

preserve the archives, mechanisms for follow-up might be established. An existing institution can deploy these mechanisms, a new one could be created or the civil society might as well take this role.

Lastly, TCs may be given a mandate for reconciliation although the accomplishment of this task depends on many other conditions apart from the clarification of past abuses. TCs can be helpful in advancing towards national reconciliation because they can perform official accounting and draw conclusions about the facts and conflicts, which allow opposing parties to debate and govern together (Hayner, 2011).

Truth commission design: Mandates and composition

TCs should have a mandate that provides the guideline to perform the subsequent work, although these mandates may be very diverse (Hayner, 1994; Sandoval, 2011; Antequera, 2014). The mandate establishes the scope of investigation and the abuses to be covered, the time-period to be examined and the functions a TC has in relation to criminal justice (Ceballos, 2009). In addition, the mandate should specify which actors are to be examined in the commission and the territory where the violations occurred (ICTJ, 2013). It should be tailor-made according to the characteristics of the country and the specific needs of the society.

For example, the famous South African TC had the power to investigate crimes committed during apartheid, including the use of subpoena and seizure powers, to have public hearings, and to recommend the granting of an amnesty for perpetrators in exchange for full disclosure. This commission was also allowed to award interim reparations and to make recommendations in this respect. In contrast, the Argentinean National Commission on the Disappeared (Conadep) was mandated only to investigate the disappearances that took place in the country between 1976 and 1983, without subpoena or seizure powers. (Sandoval, 2011, p. 8)

Despite the differences from case to case, according to the USIP (2008) a TC mandate should have the following elements: clear objectives; legal authority to interview witnesses and

collect testimony, including in some cases the power to compel such testimony; defined types of violations the commission will investigate; specific time period to be investigated; defined time granted to the commission to complete its work; and, an identified authority to issue recommendations. Another important component of the commissions is its composition and staff. These are important elements for the legitimacy of the commission that not only depend on the commissioners' qualifications, backgrounds and expertise, but also on the selection process (USIP, 2008).

Truth commission measurement and impact

After explaining the importance and the elements that constitute a TC, some questions remain. What makes a TC successful? How can the impacts of its results be measured? According to Brahm (2007), the literature about TC in this regard is rather ambiguous, relying merely on anecdotes and moral convictions. Furthermore, "while many HHRR advocates have become sold on truth commissions, these transitional justice mechanisms have been increasingly criticized as either ineffectual substitutes for prosecution or as potentially destabilizing forces in the midst of delicate transitions" (Brahm, 2007, p.17). Scholars can then be divided into three groups when thinking about TCs' impact. The ones who support them as a mechanism providing redress for victims (Minow, 1998; Boraine, 2000), the ones who see them as weak substitutes of prosecution (Fitzpatrick, 1995; Brody, 2001) and the ones who criticize their fomenting of different interpretations of history (Brahm, 2007; Llewellyn, 2006).

Despite these difficulties, the literature on this topic has outlined a set of objectives the commissions should accomplish. The basic ones included in this paper, are: 1). The achievement of its mandate, 2). The accomplishment of its objectives, and 3). The issue of a final report and recommendations, which are expected to have some political and social impact (Ceballos, 2009).

In terms of impact, one big success of TCs is when they can influence institutional reform (Bakiner, 2014). "It is essential that there is implementation and follow up to the recommendations of TCs by the Government and State authorities to prevent further heinous crimes and to help the State to move towards reconciliation

and peace” (OHCHR, truth commissions, 2006 cited by Sandoval, 2011, p. 8). Nevertheless, historically the influence of TCs’ recommendations is weak (Ceballos, 2009). An exception is the case of El Salvador and its institutional reforms to protect the procedural rights of defendants and victims (Hayner, 2011).

Bakiner (2014) argues that TCs’ impact could be explained in four ways: direct political impact, indirect political impact through civil society mobilization, vetting, and judicial accountability (positive and negative influence). Nevertheless, the measurement of these aspects would mean an exploration of the pre-commission context and then the post-commission one to assess the hypotheses. Impact is then constituted “by the content of the final report and, equally importantly, by the process itself. It is shaped, but not predetermined, by the mandate limits” (Bakiner, 2014, p. 15).

In case of direct political impact, the most straightforward consequence is the inclusion of the TC’s recommendations into policy², whereas for the non-direct political impact, social pressure in form of protests or other mechanisms is necessary for the Government to adopt the recommendations. Vetting is also a possible impact, consisting in the removal of perpetrators’ political supporters from the public office. Lastly, the judicial impact of TCs is still controversial and when it happens it is normally in a very limited scale (Bakiner, 2014).

II. Methodology

Following the theoretical explanation on the aspects that constitute a successful TC, namely: 1). The achievement of its mandate, 2). The accomplishment of its objectives, and 3). The issue of a final report and recommendations, which are expected to have some political

² “Nevertheless, one observes near-universal demand for certain policies and political gestures, which I employ as indicators of direct political impact: Public endorsement of the commission’s work by Government leadership; government publication of the commission’s final report; implementation of a reparations program (this measure is applicable in 12 cases where the truth commission recommended reparations); and the creation of follow-up institutions to carry out the recommended reforms and monitor progress” (Bakiner, 2014, p. 20).

and social impact, this paper will revise the TC proposal announced by the FARC-EP and the Colombian government in June 2015. To examine the theoretical proposition, a deep revision of the proposal will be conducted, classifying the proposal according to the three categories mentioned above. Secondary sources and newspaper examination will complement the observations. As the commission is still to be constituted, this paper is only a reflexive document based on a critical reading of the proposal and therefore, it constitutes a prospective exercise that could help practitioners think about the possible hurdles and voids the commission could face. Furthermore, in a final section the paper will provide some possible challenges to think about when the TC is actually established.

III. Truth commission with FARC-EP

On June 4th of 2015, the Government of Colombia and the FARC-EP, the biggest and oldest guerrilla group in the country, published a common communiqué announcing their agreement on creating a TC called Commission for the Clarification of Truth, Conviviality and Non-Repetition. This commission is of utter importance to Colombian society given the long conflict between the parties that has led to a 220.000 death toll between 1958 and 2012 (CNMH, 2013). The agreement follows the victims' participation in the negotiations in La Habana and further emphasizes the need to hear these voices in the transitional justice.

To make the decision whether or not a truth commission should be established, broad consultations with victims and civil society should be held. If critical resources, political will, or impartiality are lacking, it may be better not to convene a truth commission at all, rather than to initiate a process that will not be able to fulfill its goals. (USIP, 2008, p. 8)

In the case of Colombia, the institutional capability, the resources and the politics will exist. A prove of it is that the TC proposal is a common agreement of conflicting parties who are engaged in a peace process since October 2012. Furthermore, this is

the first time in Colombia that a TC (not limited to a Commission of Inquiry) will be created in common agreement with the conflicting parties³. In national history, a TC in the strict sense has not existed until now (García, 2014); HHRR violations have been discharged with silence pacts (Rojas Pinilla Dictatorship), amnesties (M-19 and Palace of Justice Siege on the 6th November 1985) and other unilateral mechanisms such as Law 975/2005 used in the peace process with the paramilitaries (Ceballos, 2009; García, 2014).

In recent years, Colombia has advanced in policies to address the situation of victims in a possible post-conflict scenario. In 2011, the Government issued Law 1448/2011, which establishes a reparation program and many institutions to identify victims, their harms and provide compensation. In this sense, the TC in Colombia arrives when many other transitional justice mechanisms are already in place. In terms of truth, the National Center of Historical Memory (hereinafter CNMH) has advanced in many emblematic cases of HHRR violations in the country and has published information about the history, dynamics and events that have characterized violence (García, 2014).

Moreover, the fifth point of the 10 principles for the 5th round of peace negotiations about *Victims* establishes that both parties, the Colombian Government and the FARC-EP, will contribute to the clarification of truth, including its causes, origins and effects as a fundamental requirement to satisfy victims' rights and the society in general (Joint Communiqué Negotiations, 7th June 2014). In order to achieve that, a Historical Clarification Commission (hereinafter CHC) was created to highlight the different truths and interpretations that exist about the Colombian conflict. Secondly, the United Nations jointly with the National University of Colombia summarized victims' proposals in regard to many points of the negotiations' agenda but particularly on truth, reparations, and non-repetition (Bouvier, 11th November 2015). These initiatives, product of the negotiations, contain inputs that provide sufficient information for public and social deliberation, in particular for the

³ This paper will not explore in depth these previous attempts to uncover truth. See Ceballos (2009) for a description of other extrajudicial commissions that have been established in Colombia.

task of collective memory and truth. In this regard, for Colombian society it is still necessary to know who did what, how, why and which were the power mechanisms that facilitated the abuses (Centro de Memoria Paz y Reconciliación, 2014).

A report by the UN Independent Expert on Impunity states that,

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes [and specifically that] victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place. (Hayner, 2011, p. 24)

As in this academic exercise it is not possible to know still if the Colombian TC will be successful, only the TC's proposal will be analyzed in terms of what could be the opportunities and challenges for the commission to accomplish its mandate and objectives, issue the final report and to achieve certain impact with its recommendations. As it was already said, the effectiveness of TCs will depend on these three factors (Brahm, 2007).

IV. Analysis

Commission's objectives

According to the 53rd communiqué of the negotiations in La Habana, the Colombian TC should achieve three fundamental objectives. First, it should clarify the truth about HHRR abuses product of the conflict and give a comprehensive explanation of the conflict as such, specially the most denied aspects of it. Secondly, it should contribute to recognize victims as subjects of law whose rights were violated and it establishes the need of a voluntary recognition of responsibility by the different conflicting parties. The third objective of the commission is to promote the peaceful coexistence of the society in the local level, creating dialogue environments where victims can be re-dignified and collective and individual accountability can be achieved (Jointly Communiqué 53, 4th July 2015). This last objective is very important because war in

Colombia and its related HHRR abuses have concentrated mainly in rural areas. If the commission does not effectively work in a local and regional level, the results will not be optimal.

In addition, this commission should acknowledge the dynamics behind violence such as the repression to political opposition and participation, crucial for national peace building. According to Antequera (2014), when TCs perceive only the roles of victims/perpetrators in a two-sided confrontation, ignoring in turn the existence of policies and plans of political repression, elimination and suppression, these practices escape from the TCs' scope, which frames an incomplete way of understanding the conflict and revealing the truth. Therefore, it might be necessary for the commission to explore the experiences of opposition and resistance within the conflicting history.

The commission to be installed in Colombia has a very political and ethical content, and therefore it should remain completely impartial and independent from political forces. The composition of the TC will be of eleven commissioners designated by a selection committee. The selection committee will have nine members: the Government and the FARC-EP will select six of them jointly and the remaining three will be the representatives of three organizations also selected jointly during the negotiations (Joint Communiqué 53, 4th July 2015). The problem here lies on what conditions and procedures there are to choose the last three members of the selection committee. This information is vague and it could make a big difference in the selection of the TC's commissioners and therefore its impartiality.

Mandate

The TC's mandate establishes as its first task the clarification of facts that constitute serious HHRR violations and grave infractions to the International Humanitarian Law, in particular those representing abuse patterns or those that were committed massively. It also emphasizes on the conflict dynamics in the local and regional levels (Joint Communiqué 53, 4th July 2015). The first question that arises with this mandate is how is this going to be possible in a conflict that has lasted so long? And how will the commission be articulated with other mechanisms of transitional justice such as the eventual

transitional trials? A very important issue in this regard, as well, is the clarification of truth for victims of enforced disappearance, for whom the TC constitutes a unique opportunity (Hayner, 2011) to know what happened to the 50.000 and more victims of this crime reported until 2011 (CNMH, 2013).

An important problem for the mandate's implementation is also the fact that before the agreement on a TC, both sides, the Government and the guerrilla, have denied their responsibility in HHRR abuses. The FARC-EP has many times been reluctant to acknowledge its accountability on serious HHRR violations, war crimes and crimes against humanity (La Silla Vacía, 4th June 2015). This could be their political strategy to preserve some legitimacy and avoid prosecution, but it could have severe implications for truth seeking. Besides, some political sectors continue referring to guerrillas as criminals, undermining the political component of the conflict that has in turn produced systematic violence. In addition, the Colombian State has also frequently denied a collective (institutional) responsibility in the conflict and this precedent may hinder the mandate's scope (La Silla Vacía, 4th June 2015).

In this regard, the International Crisis Group (ICG, 2013) highlights that subordinating the truth to political goals is a mistake since a credible TC would help both sides on their long-term interests. On the Government side, a strong TC will help to cater victims and those who support them, advancing in an impartial environment. At the same time, the commission would give the FARC-EP a public forum to discuss their perspective on the conflict without making it a propaganda mechanism. The task of recognizing responsibility should be easier in a context where other actors are involved and it may even promote participation of ex-combatants. At this point, it is crucial to understand that a TC is simultaneously a political mechanism as well as an investigative process (Castillejo, 2014). There is a tight relationship between the conditions of investigation (mandate, assumptions, objectives) and the different political national and international influences on the negotiation process. It is impossible to read the TC's proposal and omit this fact.

The second point of the mandate proposes the clarification of collective responsibilities from the State, the Government, the public powers, the FARC-EP, the paramilitary forces and any other national or international organizations or institutions that have

directly or indirectly participated in the conflict. This point of the mandate is very ambitious because it tries to cover all the actors that have participated in more than 50 years of war. On one hand, this comprehensive approach would contribute to a more plural understanding of the conflict and it will show the different truths of multiple actors. It additionally exceeds the logic of the two-sided confrontation, unveiling the interests underneath war that have involved companies, foreign States, public institutions, etc. This approximation contrasts with the one assumed with Law 975/2005 and the mandate of the National Commission for Reparation and Reconciliation that only took into account the conflicting parties (Antequera, 2014; Castillejo, 2014).

On the other hand, in spite of the inclusivity of this approach it is very important to ask: is this possible? Can the Colombian TC resolve these issues in 3 years? In addition, the mandate includes the participation of Paramilitary Forces but they officially demobilized in 2003. Then, it is worth asking: what incentives would Paramilitary Forces get to cooperate with the TC at this point? Do they have important incentives for telling the truth? Will the TC cover crimes committed by new paramilitary groups? Lastly, the responsibility of international Governments and corporations in the escalation of violence in Colombia is beyond doubt but how are the procedures going to be? According to Hayner (2011, p. 78), “the role of foreign entities in supporting such Governments or armed groups is often an important part of the story, and thus should be investigated, or at least formally recognized, in a truth report”. The issue is how to keep a balance in the main core of the investigations and still acknowledge and investigate the role of foreign countries. In sum, the second point of the mandate seems to be too broad to be covered in 3 years’ time.

The third, fourth and fifth points of the mandate deal with the impact of conflict in the society in general from a differentiated perspective that includes the particular impact on women, LGTBI, journalists, peasants, aborigines, children, among others. Point four deals especially with the impact on democracy and politics, focusing on the political parties and political movements, specially the opposition. Point five engages the impact of conflict on combatants and their families. In spite of the importance of these aspects for a collective construction of truth and memory, the description of tasks

is general and its scope is still not clear. However, it is remarkable that the mandate assumes a gender and differentiated perspective to tackle the impact of conflict. In Colombia, the majority of direct victims have been men, but the ones who assumed the related costs of the victimization of their husbands, sons, fathers and brothers, are women. Moreover, between 1985 and 2012, 2'420.887 women have been enforcedly displaced, 1.431 have been victims of sexual violence, 2.602 have been enforcedly disappeared and 12.624 have been murdered (CNMH, 2013). Thus, particular measures should be considered for the hearings, taking into account the nature of some of these crimes and the cultural barriers of speaking publically about them (ICG, 2013).

The sixth point of the mandate is to clarify the historical context, the origins and the multiple causes of the conflict, taking into account the findings of the CHC. This point is one of the most problematic ones, because it has not yet been established what period of time the TC will specifically cover. The formation of guerrillas started in 1964, but previously there are many historically related events that make it difficult to estimate when the conflict actually began (CHC, 2015). Neither the negotiators, nor the scholars of the CHC have agreed on it. This fact is problematic because the definition of a period of study could leave part of the truth behind or could overwhelm the whole process, raising expectations that would end up in frustration because the commission might not have the capacity (technical, financial, human) to fulfill its duties.

The seventh point of the mandate deals with the (structural) conditions that have contributed to the conflict's duration. One could infer that among the different conditions, there are State institutions and officials who permitted the abuses. In this regard, the commission is expected to make recommendations for institutional reform but the implementation of these might be difficult if there is not an organization that would promote them. In particular, it is expected that an institution such as the Colombian Army will make a stand against any changes because they still do not recognize their collective responsibility in HHRR violations in Colombia (La Silla Vacía, 4th June 2015).

Finally, it is important to mention that the mandate has taken into account the contributions of local social initiatives

for the reconstruction of memory and truth, as well as the recommendations of the victims' delegation in La Habana. These facts could contribute positively to the legitimation of the TC. Nonetheless, one hurdle the commission could face is to raise very high expectations. The nature of the commissions will force the prioritization of emblematic cases that respond to collective patterns of violence and not to individual ones. As Hayner (2011, p. 75) points out "indeed, it is evidently unrealistic to expect full and complete information about all violations where the number of victims is very high (...) However, good faith to provide as much information as possible, and to preserve and make publicly available any existing State archives, can be expected" and count as a positive result for the commission.

Some considerations for the impact

The Colombian TC's proposal establishes clearly that the commission is an extra-judicial mechanism and its results cannot be used as evidence in trials, nor can judicial authorities have access to TC files (Joint Communiqué 53, 4th July 2015). These are serious restrictions for the commission's results and the impact they may have, although it may facilitate the confessions of people who do not want to incriminate themselves or promote testimonials of new witnesses. Despite these restrictions, the disconnection of the TC and the courts at this point does not necessarily translate into amnesty.

An additional restriction is the fact that the responsibilities in the conflict will be assumed "voluntarily" (Joint Communiqué 53, 4th July 2015). This constitutes a risk for the trustworthiness of the information that will be provided by perpetrators. It is still unclear if in Colombia the formula truth for amnesty will take place, but if that were the case, what incentives would remain for perpetrators to tell the truth? And what kind of truth is going to be pursued when it is assumed as a voluntary contribution and not as a duty, in particular for the perpetrators? However, although the majority of TCs have not had any judiciary powers, this does not mean that in the future it is unlikely that TCs' results will have a positive impact in judicial accountability. This could happen with a delay like in the cases of Argentina, Chile, Chad, El Salvador, Sri Lanka, Guatemala, Nigeria and Peru (Bakiner, 2014).

The discussion behind the relationship between truth and justice relies on how complementary or exclusive judicial and extra-judicial mechanisms might be. According to Bakiner (2014, p. 7) “truth commissions’ contribution to HHRR accountability or impunity is [still] a controversial issue”. Hayner (2011, p. 91), quoting José Miguel Vivanco’s statements in relation to the TC in Guatemala, wrote:

When TCs seemed to suddenly gain prominence [1990’s] (Hayner, 1994, p. 606f), there was considerable worry from HHRR advocates about the intention and the impact of these bodies, particularly in contexts where criminal justice was unlikely and political resistance to accountability was high. There was, simply, a suspicion that truth commissions were likely to weaken the prospects for proper justice in the courts, or even that commissions were sometimes intentionally employed as a way to avoid more serious accountability (...) [in many contexts: Guatemala, Sierra Leone, Democratic Republic of the Congo, Liberia, etc.] there has been either an explicit or an implicit link between an agreement for a truth commission and an agreement, understanding, or hope that there would be no trials.

However, there is no evidence that TCs advocate impunity or serve as a replacement or distraction from trials, in most of the cases “the failure to prosecute has resulted from many other factors, but not from the existence of TC” (Bakiner, 2014, p. 29).

On the contrary, the judicial and extra-judicial mechanisms could be interpreted as complementary when the strengths of one balance the weaknesses of the other (Uprinsky/Saffon, 2006). This approach assumes that both rights are necessary. In the Colombian case, there is a need for collective truth because some parts of the national history still remain denied or unknown and these historical voids cannot be fulfilled just with criminal justice. Partially this is what happened with the demobilization of the Paramilitary Forces, in which there was an effort to reconstruct truth, but it failed as not all perpetrators told the truth and the historical reconstruction of cases was a personal decision of the judges and not an obligation. Moreover, from the testimonials given by perpetrators more than 12.869 cases were identified, in which a third perpetrator, not

included in the transitional justice program, was accused (García, 2014). Nonetheless, until today the Public Prosecutor's Office has done nothing about it. This means that there is a disconnection between different mechanisms and institutions and for this reason the establishment of a TC should prevent this lack of coordination to happen again.

Although sometimes TCs are perceived as innocuous because they do not have judiciary powers, in perspective, trials have had scarce achievements as well. For example, the mixed international tribunals, the international tribunals and the International Criminal Court have performed modestly (Hayner, 2011), whereas the TCs in Argentina, Guatemala, Chile and South Africa were very important for reconciliation in those countries. In this respect, some TCs have been set up specifically to foster reconciliation. The best example is the South African Truth and Reconciliation Commission, but the correlation between truth and reconciliation is also uncertain (Hayner, 1994; Twose/Mahoney, 2015).

Reconciliation is a long and complex process that TCs cannot promise to achieve because individual forgiveness is a victims' right; therefore, TCs are better at advancing in the national reconciliation (Villa-Vicencio, 2006; Bakiner, 2014). On a social level truth may facilitate reconciliation but it should be accompanied with deliberations on how to face the future (USIP, 2008). In the case of Colombia, the term used in the name of the TC is not reconciliation but *coexistence* and it is supposed to be achieved in local and regional levels. Within this framework, this objective is perfectly attainable taking *coexistence* as the first step for reconciliation. Reconciliation is a process because it consists on creating an environment in which the parties can coexist, shortening the social distance and enabling the possibility to pursue goals together (Villa-Vicencio, 2006). What it has to be defined in Colombia is how the approximation between victims and perpetrators will be, how the commissions will operate in the regions and how specific parts of the society, in particular the minorities, are going to be included.

A further purpose of TCs is the acknowledgment of victims' suffering and perpetrators' responsibility, normally followed by public apologies that seek to restore the dignity and respect that was once violently taken from the victims (Marrus, 2006). In this sense, TCs recognize an asymmetry between the victims' and the

perpetrators' stories and therefore, they give a voice to victims that normally trials do not give (ICG, 2013; Bakiner, 2014). Victims' narratives help to comprehend the dimensions of harm and their characteristics, so a more complete reparations program can be designed. Nonetheless, perpetrators' narratives still remain important, even for TC because they allow an understanding of the most detailed dynamics of violence and atrocity. "The resulting collective narrative would concern not only violence, but also wider socio-economic harms" (ICG, 2013, p. 31).

As a consequence, one could infer that the concrete role and impact of truth commissions do not necessarily damage or weaken criminal justice (Hayner, 1994). On the contrary,

[...] Many truth commissions have made significant efforts to try to advance prosecutions, including by providing to prosecutors the names of suspects and clear evidence on which to build a case. But even beyond the possibility of providing information for trials, many HHRR advocates now see truth commissions generally as a positive step toward accountability. Among those advocating for criminal justice, the fear of a 'trade-off' between truth and justice has largely receded. (Hayner, 2002, p. 92)

In sum, the articulation of the extrajudicial truth and the judicial truth will account better for a successful transitional justice process than the complete reliance on one of them (Uprimy/Saffon, 2006).

V. Challenges and opportunities

1. There are many truth and memory initiatives already implemented. This means there is much information previously found about the dynamics of HHRR abuses, the perpetrators and the logic behind certain actions (Antequera, 2014). Nonetheless, detailed information about the purposes of violence, especially the one conducted by the State, is still unclear. According to Antequera (2014), since the issue of Law 1448/2011, an imaginary of the Colombian conflict, merely as a confrontation between two sides, has been promoted. This hinders

the plurality of logics behind the actual confrontation that includes actors who have either directly supported the conflict or have taken advantage of it according to their interests.

As a consequence, the definition of violence assumed by the TC is very important. When violence is understood from a structural point of view, further considerations such as the socio-economic harm and who the beneficiaries from the conflict in Colombia are, should be examined (Castillejo, 2014). There is no doubt about the conflict's function in land looting in Colombia, nurtured by the enforced displacement of entire populations, the establishment of legal and illegal powers, the participation of foreign countries and even of the Colombian security agencies. The ICG (2013, p. 31) states in this regard, "the most significant added value of a TC would be to reveal the thick web of connections between armed groups, economics, politics and violence".

Therefore, the TC has to complete this information, concentrating on the new challenges, unanswered questions and a more exhaustive inquiry to fill gaps of information. The prior findings should be re-legitimized, re-built and incorporated in the reconstruction of truth, and their impact should be strengthened in the public sphere as well. One of the most important contributions for truth and memory in Colombia is the report called *Basta Ya* issued by the CNMH (2013). This report represents the most complete research ever done in Colombia in regard to conflict, its origins, motives, dynamics, its relationship with justice, victims and historical memory. The challenge of the TC is how to articulate these findings with its mandate and functions (García, 2014). It is crucial to foster relationships between the TC, public and private organizations and NGO's that could provide expert training, access to their information and introductions to local communities. "They [NGO's] are also often an important source of collected evidence for the commission, and can play a valuable role in facilitating victims and general public participation in the truth commission process" (USIP, 2008, p. 10).

2. It is important to recognize that the judicial system in Colombia is not perfect, but it is still capable of investigating. Then, the challenge for the commission is to articulate its functions with the ones of the procedural bodies, combating at the same time their

institutional weaknesses (Ceballos, 2009). Although the mandate of the TC establishes that the commissions' files cannot be used as evidence in courts and even that the judicial bodies won't have access to them, some collaboration between the two instances could exist in regard, for example, to witnesses' protection, institutional independency and under the conditions that the perpetrators should accomplish to tell the truth in the commission, in court or in both. Besides, if TC's findings cannot be used in trials, it will mean that judiciary bodies have to cover a very similar ground to the one already investigated by the commission.

The commission might pave the way for an improved prioritization process, building on work already underway in the attorney-general's office, by producing a preliminary report on the general patterns of violence. Its final report could highlight information that merits special consideration by the attorney-general. (ICG, 2013, p. 35)

Furthermore, it is necessary to specify if there is going to be a model of amnesty for truth, how it is going to work, when and where. The establishment of a TC opens the discussion on how criminal justice is going to be achieved and how it will interrelate with the TC. In this sense, if the most *responsible ones approach* proposed by the Legal Peace Framework or the Special Jurisdiction for Peace proposed in September 2015 are finally going to be assumed, how would they relate to the commission? At the same time, how will the Military Criminal Justice system be articulated to the transitional reforms? The coordination between these systems is crucial to avoid impunity, task overlapping and operational ineffectiveness. As evidence suggests,

Even when commissions have made full use of their capacity to facilitate prosecutions, courts have neglected their findings. The Special Court for Sierra Leone, for example, had the power to force the Sierra Leonean Truth and Reconciliation Commission to share the information at its disposal, but the prosecutor rejected the possibility. In the end, truth commissions produce limited judicial impact, but not necessarily due to their own fault. (Bakiner, 2014, p. 27)

3. Colombia will create its TC with lots of international TCs' experience, learned lessons and good practices. The study of TCs in other countries can provide many 'to-do' and 'not-to-do' lessons. For instance, TCs have been gradually acquiring more and more tasks, a situation that strengthens the importance of these bodies⁴ (Hayner, 2011) but could also represent its failure. In this sense, the Colombian TC could also fall into this trap and build a very ambitious mandate, trying to cover as many duties as possible. This sounds good in theory, but in praxis it would not work because the commission won't be able to fulfill these high expectations. In this sense, it is better to have a TC with a realistic scope rather than end up in failure.

4. In terms of political participation there is a big challenge the commission will eventually meet and it is the recommendations for vetting processes vs. the eventual political participation of FARC-EP ex-combatants. This topic is challenging because with a highly polarized civil society, every decision in regard to prosecution or vetting of public servants or military offices will be contrasted with the allowance of FARC-EP ex-members to political participation. The latter is one of the most important points in FARC-EP's agenda and at the same time, the power of TCs to recommend about vetting and institutional reform represents one of the most important political impacts the commissions could have (ICG, 2013). Nonetheless,

A commission may or may not make an explicit recommendation for vetting, and if it does, the Government may or may not implement it (...) Despite truth commissions' best efforts, recommending vetting does not appear to be a significant impact mechanism. Although four of the 15 transitional truth commissions demanded the removal of presumed perpetrators from office, only one Government has met this demand partially [El Salvador]. (Bakiner, 2014, p. 24)

4 Despite of their more limited legal powers, their broader mandate to focus on the patterns, causes, and consequences of political violence allows truth commissions to go much further in their investigations and conclusions than is generally possible (or even appropriate) in a trial (Hayner, 2011, p. 13).

However, the TC should explore the history of the opposition in Colombia, the State's repressive policies against it and the institutions that permitted political exclusion and instigation (Antequera Guzmán, 2014). Moreover, it would be necessary to inquire on the links between politicians and armed groups (*FARC-Politics* and *Para-politics*). How are these events going to be investigated? As it was said, these situations are part of the invisible forces behind the conflict and a narrowed victims/perpetrators approach would not allow uncovering institutions and individuals supporting violence from backstage.

5. New paramilitary organizations are operating in Colombia since the demobilization of the former paramilitary forces in 2005. The Government considers these as criminal gangs, although in many ways they preserve the tactics and *modus operandi* of their predecessors, committing HHRR' abuses against civilians. According to the Ombudsman' Office in Colombia, by November 2014 these groups had presence in 168 municipalities in 27 departments (Ombudsman' Office in Colombia official webpage, 4th November 2014). The question here is: should the TC investigate the atrocities committed by these new actors or not? And if yes, how would prosecution be conducted? The importance of these new actors relies on their connections with recognized conflicting parties and their origin as rearmed groups; above all, they are currently victimizing populations and violating HHRR (Ceballos, 2009).

6. Colombian society is very polarized. This means that the election of the commissioners should be transparent enough, so that it is perceived as legitimate and representative. In this sense,

Policymakers could explore the advantages and disadvantages of foreign members: greater international legitimacy and possibly greater domestic standing in regions where the State lacks credibility, versus the risk that the body might seem overly influenced by outsiders, thus undermining society's appropriation of its report. (ICG, 2013, p. 33)

The Colombian TC's proposal says the two parties could select a maximum of three international commissioners out of

eleven commissioners (Joint Communiqué 53, 4th July 2015). The advantages and disadvantages of this approach remain to be seen.

Conclusions

TCs can promote a collective understanding and acknowledgement of past HHRR abuses, and if they are successfully embedded in a broad justice perspective, they can provide the conditions for peace and reconciliation. Therefore, the implementation of TCs should mind their articulation with other transitional justice mechanisms in order to achieve the best possible process. Nevertheless, TCs goals are multilayered and their impact might be complicated to measure. In this paper, three conditions were described as the basic aspects to evaluate a TC's effectiveness: 1). The achievement of its mandate, 2). The accomplishment of its objectives, and 3). The issue of a final report and recommendations, which are expected to have some political and social impact.

When critically reviewing the TC proposal issued by the Colombian Government and the FARC-EP under these aspects, some concerns and opportunities emerged. In terms of the objectives, it seems to cover in a comprehensive manner the most important goals of TCs, namely the clarification of HHRR abuses, the acknowledgment of the victims' harm and accountability, and the promotion of coexistence between former antagonist parties. Nonetheless, the dynamics behind violence such as repression to political opposition and participation should be part of the reconstruction of facts to overcome the limited logic of victims/perpetrators. At the same time, the selection of the commissioners should be transparent enough to guarantee legitimacy.

When talking about the mandate, the proposal is very complete and contemplates contributions made by other organizations and the investigation of foreign states, companies, the former Paramilitary Forces, among others, in order to clarify the truth about the conflict in Colombia. Nevertheless, this could be an advantage and a disadvantage. The question here lies on the feasibility of a three-year TC in a conflict that has lasted very long, includes too many actors and whose starting point has not been completely defined

yet. Additionally, another issue of concern is the articulation of the commission with other transitional justice mechanisms and the vague definition of some points of the mandate.

Finally, in terms of the political impact, it is assumed that the judicial and extra-judicial mechanisms are complementary. Nonetheless, the fact that the TC results cannot be used in trials represents a strong restriction. Moreover, the “voluntary” assumption of responsibilities poses many questions as well, especially in regard to an eventual *truth for amnesty* formula. Lastly, the use of the word coexistence instead of reconciliation in the TC proposal’s narrative is remarkable because it keeps expectations realistic on what the TC can achieve. The implementation of the TC in the regions and the inclusion of minorities will be crucial in this last point.

Ultimately, sometimes it is not immediately clear if a Government’s commission is more a political tool or an accurate reflection of change (Hayner, 1994), but it can contribute if its recommendations are successfully enacted when there is enough political will or engagement by civil society (Twose/Mahoney, 2015). Let’s hope this will be the case for Colombia.

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